United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

77-2025

MAY 26 1977

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GLENN DeLaMOTTE,

PETITIONER-APPELLANT

v.

CHARLES E. FENTON, WARDEN FEDERAL CORRECTIONAL INSTITUTION,

RESPONDENT-APPELLEE

B
P/S

DOCKET NO: 77-2025

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLANT

+ Appendix

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UNITED STATES COURT OF APPEALS
FILED
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QUESTION PRESENTED

1. Whether the United States, through its attorney, indicted DeLaMotte from hearsay, all in bad faith, with no expectation of a conviction at the time of his indictment?

STATEMENT OF THE CASE

On September 2, 1966 a loaded tractor-trailer truck leaving the Milford, Connecticut plant of the Shick Razor Company was hijacked. A black man, Charles Jackson, who was subsequently identified in court by witnesses, entered the cab of the truck while it was temporarily stopped and forced the driver, John Grant, into a car alledgedly driven by a co-defendant, John Walsh. Jackson and Walsh then took the truck driver to a wooded area in Alpine, New Jersey, where they tied him to a tree. He shortly freed himself and reported the hijacking to the police. A third participant in the robbery drove the truck away, which was later found empty in New York City.

On September 13, 1966, for reasons found lacking in the record, Charles Jackson was arrested for the hijacking. According to evidence adduced at this Petitioner/Appellant's trial in April, 1969, Jackson alledgedly gave a "confession" to Agent Martin Conley (which he refused to sign) who was then an FBI agent assigned to the New York office. In this "confession" Jackson inculpated himself and Walsh in the robbery/hijacking, and said that DeLaMotte was the third man who drove the truck away.

The next day Walsh and DeLaMotte were arrested. Walsh alledgedly gave a similar "confession" as Jackson's, implicating the other two, which he also failed to sign. DeLaMotte remained silent.

A month later, while all three men were incarcerated, a grand jury indicted them for kidnapping and hijacking. The circumstances surrounding this indictment will be discussed below. (See: Statement Of The Facts, infra.)

Trials of all three men were delayed when the District Court dismissed the kidnapping count against all three. U.S. v. Jackson, 262 F. Supp. 716 (DC Conn. 1967). However, the Government appealed and the Supreme Court reinstated the kidnapping count. U.S. v. Jackson, 390 US 570 (1968).

The three co-defendant's cases were then severed from each other. Charles Jackson, the first of the three to come up for trial, was convicted on July 3, 1968 before a jury, basically on the testimony of eyewitnesses who identified him as one of the culprits. He never took the stand. He was sentenced to an aggregate term of 25 years, which the court imposed under the then 18 USC § 4208 (a) (2); telling Jackson that if he would "cooperate" with the Government, it might have a favorable effect on the parole board. (See: Sentencing transcripts of Charles Jackson.)

On October 15, 1968, John Walsh changed his plea to guilty and was sentenced to 22 years under 18 USC §4208 (a) (2).

DeLaMotte's trial commenced on April 1, 1969. Several eyewitnesses to the crime testified. The truck driver, John Grant, identified Jackson and Walsh, but when asked to identify the appellant, he said: "I never saw him." (4/11/75 Tr. 292). Two

other eyewitnesses, who saw all or part of the hijacking, also were unable to identify appellant as one of the hijackers. However, by promises and rewards, the government had just then induced Charles Jackson to cooperate at the eleventh hour and he testified that DeLaMotte was his accomplice in the robbery and had driven the hijacked truck away. Ostensibly the jury found some credence in Jackson's testimony and appellant was convicted and sentenced to 30 years (regular adult). In that respect, the only evidence which led to DeLaMotte's conviction was that of Charles Jackson. See: Statements of Government attorney at appellant's sentencing; 5/12/69 Tr. 8. Also see: U.S. v. DeLaMotte, 434 F 2d 289, 291 (CA 2 1970).

DeLaMotte has been continuously incarcerated since April 19, 1969. Until late 1976 he was imprisoned at Marion, Illinois, at which time he was transferred to Lewisburg, Pennsylvania. 1/ But while at the Marion facility DeLaMotte met a fellow inmate, a one John Troglen, who intimated to appellant that he, Troglen, was in fact the actual person who hijacked the tractor-trailer with Jackson and Walsh. Troglen executed an affidavit attesting to this fact. Also, a one Armando Sacassus, another inmate at Marion, swore to an affidavit relating facts about John Walsh hitherto unknown to DeLaMotte.

1/ Respondent/Appellee was the Warden of the Marion institution, but has now been transferred as the Warden of the Lewisburg facility. However, as shown on the title page of this brief, an inmate at the Marion institution is still preparing these papers for appellant, as he researched and is best familiar with the question of this appeal.

A hearing was held in Connecticut district court relating to the above on June 14, 1972 and March 6, 1973. Both Troglen and Sacassus testified before Judge Zampano of the district court. Also testifying was co-defendant John Walsh, who for the first time said it was appellant who was his accomplice in the hijacking and not Troglen. (See: Transcript of 2255 hearing.) 2/ In a ruling filed on June 2, 1976, Judge Zampano denied DeLaMotte any relief in that action. It is presently on appeal in this Circuit.

Subsequent to Judge Zampano's ruling, DeLaMotte filed the present pro se Petition, alledging that the government indicted him in bad faith without any legal expectation of a conviction. The case was again assigned to Judge Zampano, who heard the Petition on the papers. In a Memorandum Of Decision filed on January 7, 1977, the court denied DeLaMotte any relief (See: Appendix "A") and dismissed the Petition. DeLaMotte then filed a motion pursuant to Rule 60 (b), Fed. Rules Civ. P. requesting the court to vacate its denial or further amend its decision in accordance with the issues raised. (See: Appendix "B"). 3/ That motion was denied on 2/22/77. Appellant filed a timely Notice Of Appeal (Appendix "C") and this court ordered a briefing schedule.

2/ Walsh subsequently committed suicide. DeLaMotte, in his petition to the district court in the present action, submitted an affidavit as an exhibit, pointing out recent information that had came in hand which told that Walsh had lied at the former hearing.

3/ Appellant contended in that motion, and contends here, that Judge Zampano misinterpreted the issue behind his Petition and did not touch upon the issue in his decision.

STATEMENT OF THE FACTS

Preface

Being that DeLaMotte is alledging that his indictment was begot in bad faith by the government, who fully knew they had no evidence to bring appellant to trial at the time of the indictment, the facts surrounding that presentment and true bill are certainly germane. Therefore, we will attempt to reconstruct the events leading up to that indictment as best we can from the record. 4/

There is no record of the grand jury proceedings in this case, for, astonishingly, the government claims that in this case, where a penalty of death was a possibility at its inception, no stenographic notes were taken at the grand jury meetings which indicted appellant. To compound that error by the government, they further aver that the yellow pad notes taken by a bystander in the grand jury room are "lost." Appellant has never seen these notes. 5/ In spite of this, appellant submits that reasonable conclusions can be adduced from the testimony on record and proffers these:

4/ Interestingly enough, Judge Zampano, in his Memorandum of Decision supra, found for a fact that DeLaMotte was indicted by hearsay. See: Memorandum Of Decision, Footnote #1. As will be seen, that went without saying. But as the district court misconstrued, the appellant is not attacking the per se use of hearsay in the grand (con't)

Facts

Co-defendant Jackson was arrested on September 13, 1966. He alledgedly made statements to Agent Conley wherein he inculpated himself and co-defendants Walsh and DeLaMotte in the hijacking and kidnapping. These statements were reduced to writing, which, Agent Conley testified to at appellant's trial, Jackson refused to sign. It was established that only Agent Conley talked with Jackson concerning the robbery.

On September 14, 1966 co-defendant Walsh was arrested. He also supposedly made an oral statement to Agent Conley inculpatin himself, Jackson and DeLaMotte. When this alledged statement was reduced to writing, he, like Jackson, also refused to sign it.

At this juncture, assuming arguendo that Jackson and Walsh had given these statements against appellant, the government stood thusly in their case against DeLaMotte:

a) All eyewitnesses to the crime were unable to identify DeLaMotte as a member of the three man gang that hijacked the truck: and,

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(4/ con't) jury, but the way the hearsay was misused in these circumstances.

5/ There are letters on file with the district court wherein a former defense attorney for DeLaMotte diligently pressed for these notes, and wherein the government states they have been lost.

b) The two "accomplices" that inculpated him became recalcitrant after their initial co-operation, if such it could be called. 6/

After their arrest all three were lodged together in the New Haven County Jail, New Haven, Connecticut. 7/ From that time on there can be no doubt that Jackson and Walsh had no intentions of aiding the government in their case against DeLaMotte. For after they were in the New Haven Jail, FBI agents came calling on Jackson and Walsh to see if they would now cooperate. Neither one would talk to the agents and stated they had nothing to say. (Trial Tr. Vol. 2, 130). A carefull reading of the record will show that, up until a few days before Jackson took the stand against appellant on April 1, 1069 (over two and a half years after their arrest), he never even hinted to the government that he would cooperate in their case against DeLaMotte. Therefore, appellant submits that weare only left to draw these reasonable:

6/ Despite this, appellant is not laying any claim that the FBI, after Jackson's alledged statements, did not have a reasonable basis to arrest DeLaMotte. On the contrary, it would seem they had a duty to investigate. Therefore, DeLaMotte does not attack his arrest, but only his indictment.

7/ This in itself may make a reasonable man wonder if indeed Jackson and Walsh had inculpated DeLaMotte at their arrest. It is well established that the government secludes their witnesses from the very people they are informing on. In any event, the government must have concluded at this point in time that Jackson and Walsh would not further cooperate and therefore housed them with appellant.

Conclusions

Agent Conley, weeks after the three men were arrested, and knowing that Jackson and Walsh were refusing to cooperate, went before the grand jury and told the jurors what Jackson and Walsh had alledgedly told him about DeLaMotte's involvement in the hijacking. 8/ It is a fair assumption that the Government's attorney was aware at the time of the indictment that Jackson and Walsh's hearsay statements could not be used against DeLaMotte in any trial proceeding. So at the indictment stage several weeks after the arrest the government had not one scintilla of usable evidence against DeLaMotte, nor did they have any until a few days before the appellant's trial two and a half years later. It can be further concluded that the government used the indictment as an intimidating tool to force one of the co-defendants into cooperating with them to convict DeLaMotte.

8/ There is no issue whether the government had sufficient evidence to indict and convict Walsh and Jackson, especially since there was eyewitnesses to testify against them.

THE DISTRICT COURT ERRED IN DISMISSING DELAMOTTE'S PETITION FOR HABEUS CORPUS RELIEF BY NOT VACATING HIS CONVICTION AND SENTENCE AND DISMISSING THE INDICTMENT AGAINST HIM, WHICH INDICTMENT HAD BEEN BROUGHT IN BAD FAITH, IN VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION.

ARGUMENT

When the government's attorney went into the grand jury room seeking an indictment against DeLaMotte, he knew that he had no witnesses against appellant, and therefore, the indictment he sought and got was in bad faith. Actually, he had only two proper courses open to him: i.e.;

a) grant Jackson and Walsh immunity and then let them testify before the grand jury, or;

b) bring about a determination in their cases (indicting them without appellant) and then compel them to testify before the grand jury.

Instead of taking one of these paths, the government's attorney chose to subvert DeLaMotte's due process rights, forcing him to sustain irreparable damage with the loss of his freedom for nine years.

As concluded above there can be no doubt that DeLaMotte was indicted from pure hearsay. It is instantly recognized that the Supreme Court in Costello v. U.S., 350 U.S. 359 and this Circuit in U.S. v. Esteppa, 471 F. 2d 1132, have sanctioned the use of hearsay in the grand jury room. In neither one of those cases, however, does either court speak on the use of hearsay that has as its source a person that will not in fact vouch as the direct author of the hearsay. That is exactly what happened in the present case. The government attorney permitted

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Agent Conley to utter the hearsay of Jackson and Walsh, knowing at the time of the indictment that neither man would cooperate with the government. In effect, it is hearsay weaved of this type of fabric which the Costello and Esteppa courts condemned.

Furthermore, the essential facts of the Costello case and the present one before the court are not analogous in one pertinent part. In Costello the government used hearsay before the grand jury basically for convenience, and could have called all the authors to testify had not summarizing testimony by the agents been the better course for the purpose of economics. The opposite is true in DeLaMotte's case. The government had not one witness they could call before the grand jury to link DeLaMotte to the crime, and therefore had to use the subterfuge of Agent Conley. Moreover, because of the lost notes of the grand jury proceedings and the lack of professional stenographic minutes, it can only be left to the imagination whether the grand jurors where apprised of the type of evidence they were hearing. Of course, since there wasn't any hearing on the matters herein in district court, we may never know what went on in the DeLaMotte grand jury.

In Branzburg v. Hayes, 408 US 665, the Supreme Court defined the roles of the grand jurors:

> "The prevailing constitutional view of the newsman's privilege is very much rooted in the ancient role of the grand jury that has the dual function of determining if there is probable cause that a crime has been committed and of protecting citizens against unfounded criminal prosecutions." 408 US at 686. (Emphasis supplied.)

It is just such "unfounded" prosecution that DeLaMotte claims was instigated against him by the manipulation of the grand jury. As shown above, the government could not have proceeded to trial against DeLaMotte. The purpose of the indictment at that time, then, could only have been harrassment and intimidation.

This type of prosecution has been condemned for decades in the United States. As far back as 1886 the Supreme Court recognized the injustices brought against a man under color of law. In Yick Wo v. Hopkins, 118 US 356, (where Yick Wo and other Chinese were being dealt with unfairly by the ordinances of San Francisco, in that their laundries were being discriminated against) the Court enunciated as follows:

> "For the very idea that one man may be compelled to hold his life or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." at 370.

It would seem, then, that in the present case just such a situation occured: DeLaMotte was indicted at the mere will of another (the prosecutor) who, being competant counsel, understood that the proceedings started against appellant couldn't get off the ground. It can only be assumed that his ploy was to incarcerate DeLaMotte for a time, cost him the expenses and hardships a federal prosecution entails for a defendant, and hope that he could break the will of Jackson or Walsh.

Again, further expounding in Yick Wo, the Court had this to say about the case of The State of Ohio ex rel &c. v. The Cinncinati Gas-Light and Coke Company, 18 Ohio St. 262, 300:

> "Accordingly . . . an ordinance of the city council purporting to fix the price to be charged for gas, under a law giving discretionary power to do so, was held to be bad, if passed in bad faith, for the fraudulent purpose of compelling the gas company to submit to an unfair appraisement of their works." at 371 of 118 US. (Emphasis supplied.)

In the instant case, appellant was indicted in "bad faith" for the"fraudulent purpose" of harrassing him and intimidating one of the co-defendants into implicating him in the crime by the time of trial.

> " . . . and, when we remember this action or non-action may proceed from enmity or prejudice, from partizan zeal or animosity, from favortism and other improper influences and motives easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or comment upon the injustice capable of being sought under cover of such power, for that becomes apparent to every one who gives to the subject a moment's consideration." Yick Wo at 373. (Emphasis supplied).

Also at 373:

> "Though the law itself be fair on its face and impartial in appearance, if it is applied and administered by public authority with an evil eye and an unequal hand, so as to practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." (Emphasis supplied).

In Watson v. Buck, 313 US 387 (1941) the Court stated about not granting relief (injunctive) against state governments proceeding in criminal prosecutions (quoting Beal v. Missouri Pacific Railroad Corporation, 312 US 45, 49):

> "No citizen or member of the community is immune from prosecution, in good faith, for his alledged criminal acts." at page 400. (Emphasis supplied).

Thus the Court showed that its "good faith" prosecution doctrine had not been lost with the passage of time.

Similarly, in Douglas v. City of Jeanette, 319 US 157 (1943) the Court, in affirming the Circuit's dismissal of the petition for an injunction, said at page 163:

> "No person is immune from prosecution in good faith for his alledged criminal acts." (Emphasis supplied).

But it further iterated in that particular instance:

> "It does not appear from the record that petitioners have been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith . . ." at 164. (Emphasis supplied).

Albeit the Court stated in Costello v. U.S. supra, that "(N)o persuasive reasons are advanced for establishing such a rule, . . . " (350 US at 364) which would permit defendants to challenge indictments on the grounds that they are not supported by adequate or competant eveidence, appellant submits, that unlike the circumstances in Costello, this case is such a vehicle. For, like Justice Burton said in his concurring opinion in Costello:

> "I assume that this Court would not preclude an examination of grand jury action to ascertain the existence of bias or prejudice in an indictment. Likewise, it seems to me that if it is shown that the grand jury had before it no substantial or rationally persuasive evidence upon which to base its indictment, that indictment should be quashed. To hold a person to answer to such an empty indictment for a capital or otherwise infamous federal crime robs the Fifth Amendment of much of its protective value to the private citizen." (Emphasis supplied at 364).

Ergo, DeLaMotte was robbed of his "Fifth Amendment protection" by the prosecutor inside the grand jury room when he failed to tell the jurors, that even though they indicted DeLaMotte on the hearsay of an agent, this hearsay could not be used against him and the indictment would be frivolous, thereby making it a means of further harrassment to the appellant.

In 1965 the Supreme Court showed that the cases cited above were still good law. The Court said, in granting relief to petitioner in Dombrowski v. Pfister, 380 US 479, 490:

> "It would not alter the impropriety of appellee's invoking the statute in bad faith to impose continuing harrassment . . ." (Emphasis supplied)

Likewise, in Cameron v. Johnson, 88 S. Ct. 1335, 1340 (1968) the Court again reiterated:

> "Any chilling effect on the picketing as a form of protest and expression that flows from good faith enforcement of this valid statute would not, of course, constitute invasion of protected freedoms. Cox v. State of Louisana, 379 US at 564. Appellant's case that there are "special circumstances" establishing irreparable injury sufficient to justify federal intervention must therefore come down to the proposition that the statute was enforced against them,

> not because the Mississippi officials in good faith regarded the picketing to violate the statute, but in bad faith to harrass appellants exercise of protected expression with no intentions of pressing the charges or expectations of obtaining convictions. . . . We agree . . . that the record does not establish the bad faith charged." (Emphasis supplied).

Again, in Younger v. Harris, 401 US 37, (1971) the Court had this to say about the foregoing case and the one of Younger.

> "And this Court made clear that even under these circumstances the district court issuing the injunction would have continuing power to lift it. * * * Similarly, in Cameron v. Johnson a divided Court denied injunction after finding that the record did not establish the nesessary bad faith and harrassment; the dissenting Justices themselves stressed the very limiting role to be allowed for federal injuctions against state criminal proceedings and differed with the Court only on the question whether the particular facts of that case were sufficient to show that the prosecution was brought in bad faith. 401 US at 49. (Cites omitted) (Emphasis supplied).

The companion cases of Younger, decided the same day, bring out the same theme of bad faith prosecutions which the Court condemns: Cf. Samuels v. Mackell, 401 US 66; Boyle v. Landry, 401 US 77; Byrne v. Karalexis, 401 US 216; Dyson v. Stein, 401 US 200.

When held in comparison with the present case, all the above cases, though not exactly similar, are at least on a parallel line. The Court only emphasized their reluctance to abuse their powers in enforcing the Fourteenth Amendment. Had those cases involved federal prosecutions, it is submitted, by a carefull reading of the Courts' opinions, in almost every instance the relief sought by the citizen would have been granted or upheld.

United States v. Falk, 479 F. 2d 616 (1973) (reversed en banc) was vacated by the Seventh Circuit because the federal government took action against Falk, who failed to carry a draft card, without giving him the equal protection demanded by the Fifth Amendment. Speaking for the full court, one of the things that Judge Spreker noted was:

> "The second source of disagreement . . . within this court concerns the problem of proff. Certainly, the prospect of government prosecutors being called to the stand by every criminal defendant for cross-examination as to their motives in seeking an indictment is to be avoided. That does not mean that a criminal defendant is never to be afforded the oppurtunity to prove that the prosecution stems from improper prosecutorial design or that he may never cross-examine a prosecutor under oath. The presumption is always that a prosecution for a violation of a criminal law is undertaken in good faith and in a nondiscriminatory fashion for the purpose of fulfilling a duty to bring violators to justice. However, when a defendant alleges intentional purposeful discrimination and presents facts to raise a a reasonable doubt about the prosecutor's purpose, we think a different question is raised." at 621. (Emphasis supplied).

Still as late as 1974 the Supreme Court adhered to these priciples stated above. In Allee v. Medrano, 94 S. Ct. 2191, the Court found that the police, who had been harrassing union farmworkers, had "(e)xercised their authority under valid laws in an unconstitutional manner." 94 S. Ct. at 2198. They went on to say:

> "In judging whether a prosecution has been commenced in bad faith, the federal court is entitled to take into consideration the full range of circumstances surrounding the prosecution. . . ." at 2210. (Emphasis supplied).

They then went on to quote Cameron, supra, at 88 S. Ct. 1341, showing that the passage of time had not warped the bark it was etched on:

> "(T)he question for the district court was not the guilt or innocence of the person charged; the question was whether the statute was enforced with no expectations of convictions. . ." (Emphasis supplied).

In the final analysis, there can be no doubt that DeLaMotte's indictment was procurred in "bad faith" with no "expectation of (a) conviction." The government had no witnesses to appellant DeLaMotte's alledged participation in the kidnapping when he was indicted; they used blatant hearsay to have him indicted, which they knew they couldn't back up; the only two possible "accomplice" witnesses would not cooperate; and at the time of appellant's indictment, the government could no more have proceeded to trial against him, then they could have made the sun rise in the west.

The ploy of the government at the inception of the case against DeLaMotte "becomes apparent to every one who gives to the subject a moment's consideration." Yick Wo supra.

CONCLUSION

WHEREFORE, appellant DeLaMotte respectfully requests that the district court's order be set aside and that his conviction and sentence be vacated, and that the indictment against him be DISMISSED WITH PREJUDICE.

RESPECTFULLY SUBMITTED

Dated: May 23 1977

Glenn DeLaMotte pro/se

This is to certify that a copy of the foregoing brief has been mailed on this 23rd day of May, 1977, to _____, _____, New Haven, Connecticut.

Notary Public
Parole Officer-Authorized by Act of July 7, 1955, to administer oaths (18 U.S.C. 40041)

Glenn DeLaMotte

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Glenn DeLaMotte, Petitioner	
v.	
Charles E. Fenton, Warden, Respondent	Civil No. B- 76-326

MOTION PURSUANT TO RULE 60 (b)
FED. RULES OF CIV. PROC.

COMES now the Petitioner in the above entitled case and respectfully motions the court to amend or further correct its ruling filed in a Memorandum of Decision on January 7,1977.

In its written opinion, the court stated at page two that DeLaMotte proffered three grounds for granting him a new trial; that is; 1) the indictment was based solely on the basis of hearsay evidence; 2) his counsel at the time of trial was ineffective in failing to challenge the indictment on this basis; and; 3) he has new evidence inthe form of an affidavit by a fellow inmate that tends to exonerate him from the underlying charges. (Memorandum of Decision,page two). However it is submitted that the court is mistaken, for petitioner is not proffering the hearsay per se for re-litigation, nor has he submitted the affidavit as newly discovered evidence. Conversely, one of the two points (number two above) DeLaMotte did present in his Writ was ignored in the court's opinion.

As the petitioner stated in his reply brief after the government had failed to respond properly to his Writ allegations, the hearsay aspect of the claim is merely proffered to show the court how the petitioner was indicted. DeLaMotte realizes this point has already been decided by this court (it should be noted that this court in fact found that petitioner was indicted by the use of hearsay: See: footnote One of Memorandum of Decision), and therefore he doesn't ask that the indictment be dismissed solely because of hearsay being used in the grand jury. The crux of the petition was wheter the government would be permitted, in this case and circumstances, to use hearsay in bad faith, knowing that the hearsay couldn't be used in a court of law? Petitioner claims that the cases cited by him in the main brief showthat this type of actionis not condoned in the higher courts. In its decision, this court did not even touch upon the axle which DeLaMotte's petition rested upon.

It is submitted that in this court's decision. "mistake, inadvertance.....or excusable neglect ...." crept into the text, for the issue has been evaded, (Fed Rules Civ. Proc.: Rule 60 (b) (1) and that the present plea satisfys a "....reason justifying relief from the operation of the judgement." ((6), Id).

Wherefore, it is respectfully submitted that the court vacate its order in the above entitled case, or further amend it in compliance with the issues in DeLaMotte's petition for Habeas Corpus Relief.

Respectfully,

Glenn DeLaMotte

Dated: February 4th 1977

This is to certify that a copy of the foregoing was sent on this day of Feb 4th 1977 to

SWORN TO THIS DAY OF ~~MAY 1977~~.

Glenn DeLaMotte

BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Glenn DeLaMotte, Petitioner	
v.	
Charles E. Fenton, Warden, Respondent	Civil No. B-76-326

NOTICE OF APPEAL

PLEASE TAKE NOTICE that the petitioner above hereby appeals to the Second Circuit Court of Appeals from a Memorandum Of Decision filed against him (Zampano, D.J.) on January 7, 1977.

Respectfully

Dated: February 4th 1977

Glenn DeLaMotte

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Glenn DeLaMotte, Petitioner	
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As the petitioner stated in his reply brief after the government had failed to respond properly to his Writ allegations, the hearsay aspect of the claim is merely proffered to show the court how the petitioner was indicted. DeLaMotte a/ relizes this point has already been decided by this court (it should be noted that this court in fact found that petitioner was indicted by the use of hearsay: See: footnote One of Memorandum Of Decision), and therefore he doesn't ask that the indictment be dismissed solely because of hearsay being used in the grand jury. The crux of the Petition was whether the government would be permitted, in this case and circumstances, to use hearsay in bad faith, knowing that the hearsay couldn't be used in a court of law? Petitioner claims that the cases cited by him in his main brief show that this type of action is not condoned by the higher courts. In its decision, this court did not even touch upon the axle which DeLaMotte's petition rested upon.

It is submitted that in this court's decision, "...mistake, inadvertance, ... or excusable neglect . . ." crept into the text, for the issue has been evaded, (Fed. Rules Civ. Proc.; Rule 60 (b) (I)) and that the present plea satisfys a " . . . reason justifying relief from the operation of the judgement." ((6), Id).

Wherefore, it is respectfully submitted that the court vacate its order in the above entitled case, or further amend it in compliance with the issues in DeLaMotte's Petition For Habeus Corpus relief.

Respectfully

Dated: January 4th 1977

Glenn DeLaMotte

This is to certify that a copy of the foregoing was sent on this 4th day of Jan, 1977 to _____, _____, New Haven, Connecticut.

Notary Public

Glenn DeLaMotte

Parole Officer (2) Authorized by Act of July 7, 1955, to administer oaths (18 U.S.C. 4004)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

GLENN DELAMOTTE, PETITIONER vs CHARLES E. FENTON, WARDEN, RESPONDENT	Civil No: B-76-326

REPLY TO GOVERNMENT'S RESPONSE

This is a reply to a response by the Government to show cause issued by the Court on November 2, 1976.

Ostensibly, the government's attorney did not fully comprehend petitioner's claim; ergo, they did not answer it in the least--a proposition which gains credit by their terse response. They have facts wrong: e.g.; Respondent states that there is no mention in petitioner's main brief to the affidavit attached to it; that the claim presently before the Court is "no stranger to the Court." The inherent incorrectness of their short answer is obvious once the Petition is perused in objectivity.

Petitioner concedes that hearsay was a factor in the former combined motion for a new trial. In this Petition, however, it plays an intrinsic role in the claim made to the Court; that is, the hearsay was the stepping stone used by the

Government in their ultimate violation of Petitioner's constitutional rights. It goes without saying, that in spite of the government attorney's unresponsive answer, the Court is still faced with the question squarely put by DeLaMotte in his Petition: In this case and circumstances, is the United States' action in indicting defendant DeLaMotte with hearsay that couldn't be used in a court of law, only to start a prosecution in bad faith, to be condoned by the United States Courts?

Because of the foregoing, and the reasons set forth in DeLaMotte's main brief, Petitioner respectfully urges the Court to grant him summary relief, or other action as to the Court may seem just and proper.

RESPECTFULLY SUBMITTED

Dated: November 25 1976

Glenn DeLaMotte

GLENN DELAMOTTE

This is to certify that a copy of the foregoing was sent on this 25 day of November, 1976 to: Peter A. Clark, U.S. Attorney's Office, New Haven, Connecticut.

FILED
JAN 7 3 57 PM '77
U. S. DISTRICT COURT
NEW HAVEN, CONN.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

GLENN DeLaMOTTE, Petitioner,	:	
v.	:	CIVIL NO. B-76-326
CHARLES E. FENTON, Warden, Respondent.	:	

MEMORANDUM OF DECISION

On April 16, 1969, petitioner was convicted of kidnapping and interstate transportation of a stolen vehicle, in violation of 18 U.S.C. §§ 1201(a) and 2312. He was sentenced to concurrent terms of thirty years and five years to run consecutively to the sentence he was serving at the time for bank robbery. The convictions were affirmed on appeal, 434 F.2d 289 (2 Cir. 1970), and certiorari was denied, 401 U.S. 921 (1971). Thereafter, petitioner filed a combined motion for a new trial and petition under 28 U.S.C. § 2255. The Court appointed counsel; several hearings were held; comprehensive briefs were filed; and the motion and petition were in all respects denied. The rulings have been appealed and oral argument was held on October 27, 1976.

I

At the petitioner's 1969 trial, the government produced evidence that the petitioner and two accomplices, Charles Jackson and John Walsh, hijacked a truck transporting a cargo of razor blades in Milford, Connecticut. Two eyewitnesses to the crime and the driver of the truck identified

Jackson and Walsh as the persons involved, but they were unable to identify petitioner. After Jackson was convicted and sentenced to a term of 25 years, he became the government's chief witness in the petitioner's trial and was largely responsible for the successful prosecution of the case. Walsh pled guilty and was committed for a period of twenty-two years. Although Walsh declined to testify at petitioner's trial, he did take the stand at the hearing held on petitioner's motion for new trial.

II

Petitioner now moves under 28 U.S.C. § 2255 to vacate his sentence and set aside the judgment of conviction on the grounds that 1) the indictment was obtained solely on the basis of hearsay evidence; 2) his counsel at the time of trial was ineffective in failing to challenge the indictment on this basis; and, 3) he has new evidence in the form of an affidavit by a fellow inmate that tends to exonerate him from the underlying charges.

The petition must be dismissed for several reasons. First, as the Court held in its ruling on petitioner's motion for a new trial, "there has been no showing that the grand jury was misled by the hearsay evidence submitted by the prosecutor in obtaining the indictment." United States v. DeLaMotte, Criminal Action No. 11,829 (June 2, 1976). Cf. United States v. Costello, 350 U.S. 359 (1956); United States v. Estepa, 471 F.2d 1132 (2 Cir. 1972).[1/] Therefore, the

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1/ The hearsay evidence in question consisted of testimony before the grand jury by an FBI agent concerning unsigned statements from Jackson and Walsh naming petitioner as their accomplice.

hearsay aspect of petitioner's claim as well as the claim that his counsel was ineffective as to this issue is without merit.

Second, the hearsay issue is on appeal as part of the petitioner's motion for a new trial. Since the disposition of the motion on appeal may render the present petition unnecessary, the pending action is premature. See Abernathy v. United States, 303 F. Supp. 404 (E.D. La. 1969).

Third, 28 U.S.C. § 2255 provides in pertinent part,

> The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

Since this is the second time petitioner has raised the hearsay issue on a § 2255 motion, the Court will not give it further consideration.

Finally, at the hearing on the motion for a new trial, John Walsh testified that DeLaMotte, along with Charles Jackson, was an accomplice in the crimes charged. Petitioner presently seeks to introduce an affidavit that would tend to impeach Walsh, who is now deceased. This Court had a full opportunity to explore Walsh's credibility at the time of his testimony. It chose to believe Walsh's testimony over the testimony of two other of petitioner's inmates at the Federal Penitentiary in Marion, Illinois, one of whom confessed to the crime for which petitioner was convicted. The newly submitted affidavit claims that Walsh told the affiant that he lied on the witness stand. The Court is not persuaded by the affidavit. Furthermore, it sheds no new light on petitioner's conviction but only seeks only to impeach the

testimony of a dead man. Impeachment evidence alone is neither a sufficient ground for a new trial nor justification for relief under § 2255. Cf. United States v. Zane, 507 F.2d 346, 347 (2 Cir. 1974), cert. denied, 421 U.S. 910 (1975); United States v. Polisi, 416 F.2d 573, 576-77 (2 Cir. 1969).

Therefore, for all the above reasons, the petition is denied.

Dated at New Haven, Connecticut, this 7th day of January, 1977.

Robert C. Zampano
United States District Judge

CERTIFICATION

This is to certify that eight (8) copies of the foregoing Writ of Habeas Corpus was mailed to the Clerk of the Court for the Second Circuit, Court of Appeals, Foley Square, New York, New York; and one (1) copy was mailed to the United States Attorney's Office, Post Office Building, 141 Church Street, New Haven Connecticut, by sending them First Class mail on Monday, May 23, 1977, by placing them in the inmate PMB Mailbox.

Respectfully submitted,

Glenn Dela Motte

DATED: Lewisburg, Pa.
May 23, 1977